LEGAL PROCESSES IN RACE RELATIONS

by

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NOTWITHSTANDING recent events in Little Rock, Ark., and other difficulties connected with school segregation, President Eisenhower is expected again to ask Congress, when it meets in January, to adopt parts of his civil rights program which were omitted from the Civil Rights Act of 1957. Chief among the provisions desired by the administration which were dropped in the Senate, after approval by the House, will be Section III of the 1957 administration bill. This is the section which would give the Attorney General authority to initiate court injunction proceedings to enforce observance of all civil rights protected by the Constitution and federal laws, not solely the right to vote.

Chances of setting up this and possibly other stronger federal safeguards at the 1958 session of Congress are considered good, although they will be more strongly fought by southern members than was this year's compromise Civil Rights Act. The 1957 legislation was tacitly accepted by most southern senators because they doubted their ability to stage a successful filibuster against it. Republicans and northern Democrats, who expect to reap political advantage from a new civil rights fight, will probably be able to muster enough votes in the Senate to break a southern filibuster.

The Civil Rights Act of 1957 was limited in the main to arming the federal government with new powers to protect voting rights of the citizen. It will receive its first tests in the voting registration periods preceding the congressional elections of 1958. Action by the national government to obtain compliance with school desegregation orders of federal courts in Little Rock and elsewhere was not taken under the new statute. When the President ordered federal troops into Little Rock, he acted under legislation which has been on the statute books since 1861. Similar action could presumably be taken to prevent interference with court orders affecting voting rights.

Whatever else has been the impact of disturbances lately attending desegregation efforts, they have underscored the country's devotion to legal processes in the search for solutions to racial problems. Better understanding of the scope and limits of federal and state powers in the two great areas of postwar civil rights controversy—school desegregation and Negro voting—is now of special importance.

School Integration and the Right to Vote

THE SUPREME COURT on May 31, 1955, outlined the manner in which its historic anti-segregation decision of May 17, 1954, was to be carried out. The Court declared that all provisions of federal, state or local law requiring or permitting segregation in public schools must yield to "the fundamental principle that racial discrimination in public education is unconstitutional." Because "full implementation of these constitutional principles may require solution of varied local school problems," enforcement was placed in the hands of federal district courts. They were directed to enter the decrees "necessary and proper to admit [pupils] to public schools on a racially non-discriminatory basis with all deliberate speed." However, the district courts were not to initiate compliance proceedings. Primary responsibility for "good-faith implementation" was assigned to local school boards.[1]

Progress of Desegregation in South's Schools

About one-fourth of the bi-racial school districts in the 17 southern and border states and the District of Columbia had completed or begun desegregation when the 1957-58 school year opened. Most of the complying school boards had acted without district court prompting; the remainder had complied after district courts had fixed dates for commencement of integration. In the latter cases, suits alleging deprivation of rights had been brought, usually by Negro children or their parents with assistance from the National Association for the Advancement of Colored People.

Although voluntary compliance and court orders have brought about desegregation in 751 of the South's bi-racial

[1] See "Enforcement of School Integration," *E.R.R.*, Vol. II 1956, pp. 716-717.

school districts, the schools in well over 2,200 districts remain segregated. The pattern of segregation is still intact in all public elementary and high schools of seven states—Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. Although desegregation petitions have been filed in all of those states, the principle that "separate educational facilities are inherently unequal" has not yet been carried into effect in any of their school districts.

No court decrees ordering segregation have been issued in Alabama, Florida, Georgia, or Mississippi. Federal courts have specifically ruled public school segregation practices in Orleans Parish, La., and Clarendon Co., S. C., unconstitutional but have not set dates for desegregation in those districts. Court orders fixing dates for integration in several Virginia school districts have been stayed by appeals.

Opposition to compliance with the Supreme Court's edict is as strong as ever in the foregoing states, but integration has begun to penetrate elsewhere below the belt of strictly border states. Small beginnings have been made in Arkansas, North Carolina, Tennessee, and Texas. Active resistance nevertheless has been encountered not only in the capital of Arkansas but also in some other communities of the region. Injunctions had to be issued two years ago to combat interference with integration in Hoxie, Ark.; a year ago in Clinton, Tenn., and the town of Sturgis in the border state of Kentucky; this year in Nashville, Tenn., as well as in Little Rock, Ark.

Federal-State Legal Maneuvering on Integration

The legal maneuvering between federal and state instrumentalities over desegregation has been staged mainly in Arkansas, Tennessee, Texas, and Virginia. The federal judiciary has refereed steps toward integration with most consistent success in Tennessee. No school district there has desegregated voluntarily but none has resisted when integration has been ordered. There have been no appeals from integration directives in Tennessee, and the state's law enforcement authorities have cooperated in enforcement of integration orders.

Where court directives are exhaustively appealed, as in Virginia, integration has been postponed pending final set-

tlement of specific conflicts between state and federal authority. Where alleged threats of violence have influenced state governors to oppose local integration plans, Negro enrollment in previously all-white schools has been successfully discouraged, as in Mansfield, Tex., or resistance movements have been strongly encouraged, as in Little Rock.

Both the Executive and Judicial branches of the federal government, authorities generally agree, have tried all along to steer clear of head-on collisions. Not only have the courts declined to set deadlines for integration in the Deep South; they have also preferred to tolerate setbacks and delays elsewhere rather than to risk frustration of the implementation process. However, once the implementation process has been carried from beginning to end—and full accord on an integration plan has been reached by parties to the process—the federal government has served notice that it cannot back down. The two contempt citations in desegregation's brief history have been leveled, not against a school board, but against persons accused of interfering with a school board's court-approved desegregation program.[2] When Gov. Orval E. Faubus of Arkansas used National Guard troops to keep colored students out of Little Rock's Central High School, President Eisenhower dispatched federal troops to assure enforcement of the approved integration plan.

The Executive Branch on the whole has proceeded with caution. Since the original school cases were decided, the Justice Department has entered an integration case, as friend of the court, only three times—Hoxie, Ark., in 1955 and Nashville and Little Rock this year. In each case the department supported, directly or indirectly, the school board's court-approved integration program.

Government's Participation in Civil Rights Cases

Short of using troops, the only legal weapon available to the federal executive to hasten school desegregation is the *amicus curiae* (friend of the court) petition. This ancient legal privilege entitles the federal government (or with a court's consent any person or group of persons) to file a brief in support of the claims of a party to a legal suit.

[2] On July 23, 1957, John Kasper and six other segregationists were convicted by an all-white jury in the U.S. district court at Knoxville, Tenn., of criminal contempt for violating an injunction against interference with orderly integration at nearby Clinton High School. Conviction of Kasper by the court itself on Aug. 30, 1956, for another violation of the same injunction was sustained by the Supreme Court on Oct. 14, 1957.

In the original school segregation cases more than 25 groups and numerous private persons, seven states, and the federal government filed, for one side or the other, as friend of the court.

An examination of postwar civil rights cases discloses that participation of the Attorney General *amicus curiae* has been for the most part in two kinds of situations. One has been where the administration in power chose, as a matter of public policy, to express a point of view. The petitions filed in such cases, culminating with a brief against school segregation in 1954, show that the federal government, regardless of the administration in office, has consistently supported a liberal interpretation of the equal protection clause of the 14th Amendment.[3]

The other situation is well illustrated by the cases in which the executive has entered as friend of the court to implement desegregation orders. In all three cases, to obtain an injunction against interference with orderly integration entailed extensive fact-finding. The Justice Department's participation made the facilities of the F.B.I. available to collect information which otherwise might not have reached the court.

Some persons, contending that the federal government has made too sparing use of the *amicus* device, note that it never has been used to support the claims of a Negro petitioner against a non-complying school board. Gov. Faubus of Arkansas, on the other hand, accused the Justice Department of misusing and abusing the *amicus* privilege in the Little Rock dispute. Assessment of the use of *amicus curiae* petitions in civil rights suits may be within the province of the newly authorized Commission on Civil Rights.

Provisions of the 1957 Civil Rights Act for appointment of a civil rights commission received little attention during the debate in Congress, but they may emerge as the real "sleeper" of the new legislation. Bipartisan, composed of six members appointed by the President and confirmed by the Senate, the commission will be assisted by a permanent staff and may, if it chooses, set up advisory committees in the states. The commission's powers approximate those of a congressional investigating committee. The law makes

[3] Apparently the first time the Justice Department sided with a party *amicus curiae* in a civil rights suit was in 1948 in a restrictive covenant case. Since then the Department has frequently entered *amicus* in private suits to halt discriminatory practices in education, transportation, and other fields. See p. 773.

it the duty of the body to inquire into charges that citizens are being deprived of their voting rights "by reason of their color, race, religion, or national origin"; study "legal developments constituting a denial of equal protection of the laws"; appraise federal laws and policies affecting such protection; and submit a final report with recommendations to Congress and the President within two years.[4] The commission may issue interim reports on its own motion or on request of the President. All observers agree that the commission, not yet organized, may become a potent force in civil rights.

Enlarged Federal Powers to Guard Right to Vote

The U.S. Attorney General has long had authority to initiate criminal prosecutions against persons infringing citizen voting rights. The new Civil Rights Act empowers him to seek the benefits of civil remedies as well, notably the swift and binding device of injunctive relief.

The criminal statutes available are what survive of the Enforcement Acts passed after the Civil War to effectuate the 13th, 14th, and 15th amendments. Under these statutes it is a federal crime (1) for public officers to deprive any citizen of his right to vote in any federal, state, or local election on account of race, color, or previous condition of servitude; (2) for two or more individuals, whether public officers or private persons, to conspire "to injure, oppress, threaten, or intimidate any citizen" in a federal election; (3) for any public officer or private person to interfere, by intimidation, threats, or coercion, with any person's right to vote in any election in which federal officers are to be chosen.

Convictions have not been obtained under these statutes in proportion to the incidence of violations. Most of the ground gained in establishing and protecting the right of Negroes to vote has been achieved through civil suits undertaken by private persons, often with the aid of the National Association for the Advancement of Colored People.

The new civil rights law adds to the Attorney General's arsenal of legal weapons the authority to institute civil actions to enjoin any public official or private person from interfering with a citizen's right to vote in an election for a federal office. Federal officials have indicated that any

[4] The commission is to go out of existence 60 days after submitting its final report.

complaint to the Justice Department which states a *prima facie* case will first be investigated by the F.B.I.[5] Where voting obstruction is found, an injunction will be sought from a district court judge sitting without a jury. If the injunction is issued and obeyed, the case will end there. If it is issued and ignored, the judge may charge the offender with contempt of court.

Whether an offender is to be charged with civil or criminal contempt is up to the judge, but the courts have traditionally followed the principle that the nature of contempt is dictated by the nature of the acts which constitute it. The Civil Rights Act empowers the court to sentence anyone convicted of criminal contempt to spend as long as six months in prison and/or pay a fine of not to exceed $1,000. However, if a defendant convicted of criminal contempt by a judge sitting without a jury is sentenced to more than 45 days in prison or fined more than $300, he will be entitled to a new trial before a jury.[6]

If an accused person is charged with civil contempt, he is to be tried without jury in accordance with "the prevailing usages of law and equity, including the power of detention." Although this usually means detention in prison until compliance is promised, it may mean also, according to one authority, the imposition of a fine, in whatever amount the judge thinks reasonable, to be remitted to the offender only if he subsequently obeys the court's order.[7] The possibility of forfeiting bond, it is contended, would be a powerful deterrent to snubbing the court's order.

Assistance in Combating Interference With Voting

The new legislation is expected to be especially helpful in bringing about curtailment of discriminatory practices of election officials. Such practices as refusal to register Negroes, a slowdown when Negroes come to register, and prejudicial administration of literacy and civics tests can, it is hoped, be eliminated. Relief from interference with voting rights has long been available through private suits, but it is assumed that the Attorney General will be better

[5] Complaints may come from private persons, newspapers, U.S. attorneys, local officials, the F.B.I., etc.—Arthur B. Caldwell, *The Civil Rights Section: Its Functions and Its Statutes* (Department of Justice mimeographed release, January 1957), p. 4.

[6] Under the Civil Rights Act a person need no longer qualify as a state juror to serve as a federal juror. This change, it is argued, will better Negro chances for jury service in states where a person had to qualify to vote in order to qualify for jury service.

[7] Carl Auerbach, "Is It Strong Enough to Do the Job?", *The Reporter*, Sept. 5, 1957, p. 14.

able than wronged individuals to take action and to achieve results.

Against the contention that election districts may freeze registration lists and fail to appoint registrars, it has been noted that Rule 70 of the Federal Rules of Procedure gives a judge power to appoint anyone to perform an act which an enjoined party fails to perform within a specified time—although whether this rule applies to public officials is open to question.

Supporters of the Civil Rights Act assert that private persons will be as discouraged as election officials from intimidating Negroes seeking to register and vote. Possible troublemakers, private or public, often will be suspected in advance and therefore carefully watched for obstructionist activity. Branches of the National Association for the Advancement of Colored People probably will act as complaint centers in the course of carrying out the "dynamic suffrage movement" which they plan for the South.

Whether the new legislation will enable the Attorney General to proceed more surely against, not prejudicial conduct alone, but also prejudicial state laws is an unanswered question. However, Justice Department officials have indicated that the new statutory provisions may enable them to seek annulment of certain state election laws which they deem invalid.

Despite possible loopholes still exploitable, people on both sides of the question readily concede that the right to vote is better protected now than at any time since Reconstruction. Certainly, civil remedies offer more quickly and easily obtainable results than criminal prosecutions, and there is general agreement that remedy—the goal of civil action—rather than punishment—the goal of criminal action—is what is really desired. The success of the federal government in affording voting protection will depend in large measure on the ability of the Justice Department to convince the courts that reasonable grounds exist for advance issuance of injunctions. This, in turn, will require prompt reporting, skillful fact-finding, and above all, some degree of cooperation from local residents.

Campaign in the Courts for Race Equality

IN THE UNITED STATES—alone among nations—constitutional issues often are settled by court decisions rendered in law suits brought by private parties. Since the Civil War, and especially during the past 20 years, Negro litigants, relying chiefly on the charge that they have been denied equal protection of the laws, have won court victories of constitutional significance in cases concerning such matters as fair trial procedure, voting, public accommodations, housing, and education.

Landmark court victories for Negroes have been achieved, almost without exception, in cases pleaded by lawyers of the National Association for the Advancement of Colored People. Through persistence and by a careful rationing of support, the N.A.A.C.P. has gone a long way toward winning the battle for enforcement of Negro rights. Its legal action led to Supreme Court decisions condemning systematic exclusion of Negroes from juries,[8] forced confessions,[9] and verdicts made inevitable by the nearness of hostile mobs.[10] It spearheaded the successful movements to outlaw the "grandfather clause" [11] and the white primary.[12]

Restrictive real estate covenants have been declared unenforcible as a direct result of N.A.A.C.P. legal moves.[13] The association's persistent efforts to equalize educational opportunities culminated, after a series of intermediate victories dating from 1938,[14] in the Supreme Court's 1954 declaration that "separate facilities are inherently unequal." [15] Soon afterwards, N.A.A.C.P. attorneys won extension of this doctrine to certain public accommodations.

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[8] Patton v. Mississippi, 332 U.S. 463 (1947).

[9] Hill v. Texas, 316 U.S. 400 (1942).

[10] Hale v. Kentucky, 303 U.S. 613 (1938).

[11] Guinn v. United States, 238 U.S. 347 (1915). "Grandfather clauses" in state laws generally required passing of a literacy test to qualify for the franchise unless the applicant, or a blood relative, had been qualified to vote before the Civil War.

[12] Smith v. Allwright, 321 U.S. 649 (1944). The Court declared that "When . . . [membership in a political party] is also the essential qualification for voting in a primary . . . , the state makes the action of the party the action of the state" and thus is required by the 14th Amendment to grant equal protection under the laws.

[13] Shelley v. Kraemer, 334 U.S. 1 (1948).

[14] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). Here the Court declared that if a state provided law school education within the state for white students, it must do the same for Negro students.

[15] Brown v. Board of Education, 347 U.S. 483 (1954).

In sum, the N.A.A.C.P., largest and probably most effective civil rights group in the country, has gained more victories before the Supreme Court than any other single organization. Since 1915, 45 of 49 cases carried to the high bench under N.A.A.C.P. leadership have been decided as it sought. These decisions have shaped the doctrinal development of the 14th and 15th amendments.

N.A.A.C.P.'s Three-Sided Attack on Discrimination

The N.A.A.C.P.'s attack on racial discrimination is three-pronged: The organization initiates court tests, lobbies for passage of anti-discrimination laws, and carries on a public information program. Strictly speaking, the N.A.A.C.P. itself has devoted its efforts since 1939 solely to legislative and informational work. Litigation is the province of a separate organization, the Legal Defense and Education Fund headed by Thurgood Marshall.[16]

Legislatively, the association has labored for enactment of strong civil rights legislation and claims some credit for passage of fair employment practice laws in 15 states. Its educational program is pitched to the wavering and undecided. To those who contend that "education is the answer" to the race problem, the N.A.A.C.P. replies that education is needed but cannot do the job alone.

The N.A.A.C.P. has concentrated on attaining the possible. Until shortly before World War II, for example, the grosser forms of bigotry and prejudice—lynching, police brutality, the Ku Klux Klan—were exposed and combated. Since the war, the campaign for legal equality has been carried to its logical conclusion—a demand for outlawing of segregation and discriminatory practices.

Organized in 1909, very largely at the instance of leading white citizens in the North, the association has steadily grown and today has 350,000 members—about 75 per cent Negro and 25 per cent white with more than half of the total in southern and border states. A gross income of $672,422 was reported for 1955, the last year for which a financial statement has been published.[17] The organization's legal facilities, centered at the national office in New

[16] Except for this technical separation, the two organizations form a unit.

[17] N.A.A.C.P. Annual Report, 1957. The total was in addition to that portion of membership fees retained by local branches; this has been estimated at $250,000 in 1956.

York City, include a National Legal Committee, composed in 1956 of 44 lawyers, white and Negro, in 22 cities.

Local units, numbering 1,400, act as information and complaint centers, fund raisers, rights advisers, and voting clinics. They try constantly, as does the national headquarters, to remain aggressive enough to attract membership and financial support but cautious enough to avoid stirring up any more antagonism than is inevitable in some sections.[18]

Search for Legal Means of Resistance

THE ATTITUDE of most white southerners to the Supreme Court decision on racial integration of the public schools was set forth dramatically in the so-called southern manifesto read in the houses of Congress on Mar. 12, 1956. In that "Declaration of Constitutional Principles" 101 members (19 senators and 82 representatives) from 11 southern states decried the Court's "encroachments on rights reserved to the states and to the people," commended "the motives of those states which have declared the intention to resist forced integration by any lawful means," and pledged themselves "to use all lawful means to bring about a reversal of this decision . . . and to prevent the use of force in its implementation." A course of persistent but lawful resistance had been advocated by the *Richmond News-Leader* shortly after the original decision was handed down:

> To acknowledge the Court's authority does not mean that the South is helpless. It is not to abandon hope. Rather, it is to enter upon a long course of lawful resistance; it is to take lawful advantage of every moment of the law's delays; it is to seek at the polls and in the halls of legislative bodies every possible lawful means to overcome or circumvent the Court's requirements. Litigate? Let us pledge to litigate this thing for fifty years. If one remedial law is ruled invalid, then let us try another; and if the second is ruled invalid, then let us enact a third.[19]

This rejoinder foreshadowed what was to happen. Since May 1954, 141 laws designed to prevent, curb, or control

[18] For southern state laws aimed at N.A.A.C.P., see p. 778.

[19] Quoted by John Bartlow Martin, *The Deep South Says Never* (1957), pp. 11-12.

school desegregation have been added to the statute books of southern states.[20] Resisting states on occasion have not waited until challenged laws were passed on by the Supreme Court but have stricken or modified them while appeals were pending. In the Deep South legislative defiance has ranged from calls for impeachment of members of the Court to subtle forms of evasion not overtly hostile. Each state has devised a fluid, reinforced retardation plan authorizing some, or nearly all, of the following measures: Abolition of public schools; grants for private education; sale or lease of school facilities; use of public funds for segregated schools only; repeal or modification of compulsory attendance requirements; pupil placement plans; delegation of extraordinary powers to the governor. Resolutions protesting the Court decision or calling it "null, void, and of no effect" have been adopted in 11 states.[21] Most southern states also have taken legislative steps directed against groups and persons who seek to "disrupt racial harmony" or to stir up litigation. The N.A.A.C.P. has borne the brunt of this offensive.

Much of the South's resistance legislation, friends and foes of desegregation agree, will probably not pass court tests. Application of some of the laws is being held in abeyance, as reserve ammunition, until front lines give way. The pupil placement laws and the counter-attack on the N.A.A.C.P. are in the forefront of resistance action in southern states today.

Uncertain Legal Status of Pupil Placement Laws

Nine states have passed pupil placement laws—sometimes called school assignment laws.[22] Enacted as an exercise of state police power to provide for the general welfare, these statutes take the guise of state counterparts of the Supreme Court's 1955 implementing decision. Their ostensible aim is to control the integration process by setting forth procedures and standards to be followed by local school authorities.

A typical plan would authorize local school boards to place beginning students in appropriate schools and to rule on all

[20] *Southern School News*, September 1957.

[21] Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia. Florida's legislature on Oct. 9 passed a bill, signed by the governor Oct. 12, providing for automatic closing of any school to which federal troops are dispatched to compel integration.

[22] Alabama, Arkansas, Florida, Louisiana, Mississippi, North Carolina, Tennessee, Texas, Virginia.

transfer requests.[23] Each student's application would be examined separately, and the assignment made could be appealed to higher state authority. Factors to be weighed by the placement board would include educational, psychological, and moral qualifications of the applicant; the school system's physical and teaching facilities; and the threat of violence or disorder resulting from an imprudent assignment.

Although the Supreme Court has yet to rule on the validity of pupil placement laws, federal circuit courts of appeal have tentatively approved one placement law and rejected another. North Carolina's placement program has come close to receiving final court endorsement. The Supreme Court on Mar. 25, 1957, declined to review a case in which the appellate court had ruled that Negro students in McDowell Co., N.C., had to exhaust state administrative remedies before seeking relief in federal courts. While saying that constitutionality of the pupil assignment plan was not at issue, the circuit court had observed that the North Carolina law was not "unconstitutional on its face."[24] The question of whether the statute might be applied in an unconstitutional manner was left open, but admission of some Negro students to formerly all-white schools in three North Carolina communities this autumn probably bolstered the case for the law's validity.

Virginia's school assignment plan, on the other hand, was declared unconstitutional by the same appellate court that refused to void the North Carolina program. Negro pupils in Norfolk and Newport News had sought injunctions to forbid alleged racial discrimination in assigning children to public schools. District Judge Walter E. Hoffman issued the injunctions over protests of state and local officials, who maintained that the Negroes had not exhausted the administrative remedies available under the pupil placement act. The three-judge circuit court declared on July 13, 1957:

> As pointed out by the judge below . . . this statute furnishes no adequate remedy to plaintiffs because of the fixed and definite policy of the school authorities with respect to segregation and because of the provisions . . . which provide for the closing of

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[23] Only in Virginia are assignments made, not by local boards, but by a three-member state board appointed by the governor.

[24] Carson v. Warlick, 238 Fed. 2, 724 (1957).

schools and withdrawal therefrom of state funds upon any departure from this policy in any school.[25]

Local opportunity to negotiate racial adjustments in compliance with federal law is the approved formula emerging from appellate court decisions on pupil placement plans. Because the local initiative principle in school integration originated with the Supreme Court, it has been suggested that the Court may support the appellate position. In any event, pupil placement programs are presumed constitutional unless, in the opinion of a judge, the intent is to prevent desegregation altogether. Controlled desegregation, managed by local school boards, so long as race *per se* is not among the governing factors, may constitute good-faith implementation.[26]

Up to now the courts have not insisted that evidence of good-faith pupil placement include the beginnings of integration. But in time, the courts have intimated, "a prompt and reasonable start toward full compliance" will require more than a pupil placement plan valid on its face. It will require a law which is not prejudicially administered.

Conceivably, the pupil placement plan, drafted by state authorities to allow compliance, administered by local authorities to achieve compliance, and reviewed by federal courts to set the pace of compliance might provide a *modus vivendi* in the clash of race traditions. To gain court sanction, however, action would have to be initiated by private persons, usually Negro pupils seeking admission to an all-white school. Because N.A.A.C.P. has played a major role in advising and assisting pioneer applicants, harassment of the association in the South, if not stopped by federal courts, may result in a marked slowdown of the school desegregation movement.

Statutes Aimed to Curb or Halt N.A.A.C.P. Activity

The Southern offensive against N.A.A.C.P. has been waged on the same fronts as those on which N.A.A.C.P. has campaigned against southern racial practices. In all of the non-border southern states, accustomed denunciation of N.A.A.C.P. has been reinforced lately by legal or legis-

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[25] School Board of Newport News *v.* Atkins; School Board of Norfolk *v.* Beckett . . . Fed. 2 . . . (1957). Enforcement of the circuit court's decision has been stayed pending appeal to the Supreme Court, which is expected to rule on the case during the current term.

[26] "Effect of School Assignment Laws on Federal Adjudication of Integration Controversies," *Columbia Law Review*, April 1957, p. 552.

lative action. The result has been to proscribe completely, or seriously frustrate, N.A.A.C.P. activity.

In 1956 the organization was banned by state court decree from functioning in Alabama, Louisiana, and Texas, in each instance because of alleged failure to comply with existing state laws. The Louisiana decree has been overruled and the Texas decree slightly relaxed, but the Alabama order continues in full force. Meanwhile, legislative efforts to halt organized activity against racial segregation have mounted. The statutory offensive includes measures directly banning N.A.A.C.P. activity and measures seemingly designed to expose the association's members to reprisals.

Anti-barratry laws have been adopted in five states—Georgia, Mississippi, South Carolina, Tennessee, Virginia—and a state court injunction has imposed virtually the same restraint in Texas. Anti-barratry statutes bar support of lawsuits by persons or organizations not having a direct interest in the action. Anglo-American legal tradition has always viewed barratry—the "stirring up of litigation"—as a legal malpractice. Throughout the United States and England the lawyer who "makes a profession of stirring up vexatious suits to which he is not a party" has been widely condemned and often penalized, apparently to protect the legal profession against undue commercialization by unscrupulous practitioners.[27]

Undeniably, officers and members of the N.A.A.C.P. have encouraged, managed, and financed the court fight for enforcement of Negro rights. Under the organization's charter, to do less would be a dereliction. And an N.A.A.C.P. claim that a valid public purpose was being performed, one meriting exception from barratry proscription, might be strengthened by the fact that the organization has been chief protagonist in the court-approved desegregation process. Hence, while the new anti-barratry statutes may be valid on their face, they may not withstand court inspection. However, they may prove highly effective in the campaign to postpone showdowns; indeed, they make it difficult to challenge any law that the legislature sees fit to enact.

Forcing disclosure of membership and contributor lists

[27] Robert E. McKay, "The Repression of Civil Rights as an Aftermath of the School Segregation Cases."—Speech before American Political Science Association, September 1957.

is one of the simplest ways to discourage N.A.A.C.P. activity. The lists may be demanded in court proceedings, as in Alabama, Georgia, and Louisiana. Publication may be required by legislation, as in the Arkansas provision that pro-integration groups make known their contributors. Tennessee and Virginia statutes stipulate disclosure of membership lists of both organizations for and organizations against segregation. Finally, legislative investigating committees may be accorded the right to demand membership lists, as in Florida and Virginia. N.A.A.C.P. leaders recently testified that threatened opening of membership books in Virginia had precipitated a drop in membership and revenues.[28]

Hostile Legislative Investigations of N.A.A.C.P.

One of the most effective, and seemingly least vulnerable, of anti-N.A.A.C.P. weapons may prove to be the legislative investigating committee. With broad powers deriving from those of its parent body, the investigating committee may, in the course of fact-finding, demand and publish records, subpoena organization officials and question them at length about methods and finances.[29]

An investigation of N.A.A.C.P. in Florida is being conducted under a broad statute authorizing investigation of "all organizations whose . . . activities include a course of conduct . . . inimical to the well-being and orderly pursuit of their personal and business activities by the majority of the citizens of this state." A Virginia investigation is being carried on under a statute calling for a probe of groups influencing legislation involving racial activities. In Louisiana, committee hearings aimed at N.A.A.C.P. have been held under the legislature's general powers. Investigations recently authorized in Arkansas and Mississippi can be expected to range as widely as those undertaken in the other states.

N.A.A.C.P. is seeking annulment of the state proscriptions by centering an attack on the package of statutes adopted in special session last year by the General Assem-

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[28] Fear of reprisals, economic or other, was cited by Robert D. Robertson, president of the Norfolk N.A.A.C.P. branch, as the reason for a falling off of membership in testimony before the Thomson investigating committee in Richmond, Sept. 16, 1957. *Newsweek* reported, Oct. 14, that N.A.A.C.P. membership in Virginia had dropped from 19,500 to 13,500.

[29] American Jewish Congress, *Assault Upon Freedom of Association* (May 31, 1957), pp. 34-35.

bly of Virginia. The organization has asked for a declaratory judgment in federal district court which would invalidate the entire scheme at a single stroke. None of the Virginia laws, considered by itself, is patently discriminatory. By attacking the whole group, however, N.A.A.C.P. can argue that, while a single act may not on its face manifest discriminatory aims, the package clearly demonstrates intent to buttress "massive resistance."

Should the South succeed in paralyzing N.A.A.C.P., the school desegregation movement would be without its prime mover. However, in the other great area of civil rights controversy—voting protection—N.A.A.C.P. assistance is no longer as pivotal as it was before the U.S. Attorney General was empowered to become chief protagonist in safeguarding the right to vote.

Continuing Obstacles to Negro Voting in the South

Some observers, including many sympathetic with the aims of the Civil Rights Act, believe that its potential usefulness has been exaggerated. They note that the legislation has not outlawed voting interference previously not outlawed. Congress did not set forth rules and regulations for determining qualifications to vote in federal elections. Nor did it act to limit rules and regulations which the states employ to determine who may vote. Under the new act each instance of alleged obstruction must be individually investigated and remedied. This obviously poses enormous administrative difficulties; a staff of thousands would be required to follow up all the calls for intervention that may arise.

It has been suggested also that district court orders to cease interference with a citizen's attempt to register could sometimes be appealed to higher federal courts. An alleged conflict between judicial mandate and state law might provide sufficient basis for appeal and thus delay enforcement of a voting order in much the same way as integration orders have been held up pending appeal.

Where interference was too blatant to attempt appeal, an enjoined offender might attempt to color subsequent interference with some type of criminal conduct. For if charged with criminal rather than civil contempt under the new act, he would be assured of light punishment if tried without a jury and would stand a good chance of acquittal

if tried with a jury. Anyone not under court order to halt discrimination could wait until election day before interfering. An election official who waited until then to strike Negroes from the registration lists could probably not be reached under the new act. Only the difficult course of criminal prosecution would be open.

To the reminder that the Civil Rights Act increases the likelihood that Negroes will serve on juries trying voting offenders, those who criticize the legislation as inadequate rejoin that the importance of the law in that respect has been vastly overrated. While former jury requirements sometimes worked to bar Negroes from jury service, the manner and means of selecting names for jury service is still left to the discretion of local jury officials. By including the names of a few "cooperative Negroes" on jury lists, some persons allege, the prospects of obtaining conviction on a criminal charge of voting interference would be little changed.

Moreover, the authority given the Attorney General to take action against voting offenders covers only primaries and elections for federal office, not state, county and local primaries or elections. In areas requiring separate registration for state and federal elections, the Attorney General cannot enjoin interference with the right to vote for state officials. Interference there can be remedied only by private action.

Some of these loopholes may not be as wide as indicated. Threat of federal legal intervention, for instance, may be as compelling a deterrent as intervention itself. Moreover, although appeal of a court mandate may be granted, it is not obligatory that the judge stay the mandate while the appeal is pending. As for cases where trial by jury is required, southern juries in the past have sometimes convicted voting obstructors.

Perhaps the most significant single deterrent to voting interference is southern abhorrence of additional sanctions. The South is well aware that, in the minds of most persons outside the region, reluctance to enfranchise the Negro and insistence on segregation are lumped together. Justly or unjustly, both attitudes are viewed as expressions of a way of life not consistent with democratic ideals. Southern handling of either problem is likely to influence national policies in the whole field of race relations.